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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/018,402	06/12/2002	Thierry Marnay	P06794US00/MP	1151
881	7590	12/21/2004	EXAMINER	
STITES & HARBISON PLLC 1199 NORTH FAIRFAX STREET SUITE 900 ALEXANDRIA, VA 22314			MILLER, CHERYL L	
			ART UNIT	PAPER NUMBER
			3738	

DATE MAILED: 12/21/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

10/018,402

Applicant(s)

MARNAY ET AL.

Examiner

Cheryl Miller

Art Unit

3738

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 29 November 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY [check either a) or b)]**

- a) ☐ The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☐ The a) ☐ affidavit, b) ☐ exhibit, or c) ☐ request for reconsideration has been considered but does NOT place the application in condition for allowance because: \_\_\_\_\_.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 55-86.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

8. ☐ The drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

BRUCE SNOW  
PRIMARY EXAMINER

cm

Continuation of 2. NOTE: The applicant has proposed to amend both independent claims 55 and 73 to require the anchors to lie in the same vertical plane, which is a new limitation that requires further consideration and a new search, making all arguments moot. The examiner will however, out of courtesy, respond to the applicant's arguments. The applicant has argued that Bullivant (US 5,507,816) does not disclose the newly proposed amendment, anchors lying in the same vertical plane. After thorough review of Bullivant, the examiners position is as follows. Bullivant shows only one figure (fig.1) showing the location of the anchors with respect to one another. In figure 1, the anchors are shown angled relative to one another, and not in the same vertical plane. Bullivant does not disclose anywhere in the specification an advantage to using anchors angled relative to one another and does not even disclose angling the anchors at all. In fact, Bullivant does not disclose any specific orientation of the anchors. Therefore, although shown angled in figure 1, the parts are independent components and their structure renders them capable of being rotated such that the anchors are on the same vertical plane, and therefore the implant is capable of being inserted in that position. And even so, it would be at the least, an obvious relocation of parts, to move one anchor to align with the other in the same vertical plane, since Bullivant does not disclose that angling the anchors provides an advantage or solves a specific problem. The applicant has also argued that Zdeblick et al. (US 6,402,785 B1) does not disclose anchors, and that Zdeblick's implant in figure 34 is not used alone, but instead, always used with another implant. After thorough review of the Zdeblick reference, the examiner disagrees. Zdeblick's "ribs" are indeed anchors. Zdeblick even discloses the ribs to specifically "anchor", see col.1, lines 58-64. The applicant has argued that the structure of the applicants anchor is different than Zdeblick's anchoring ribs. But, the applicant has not claimed any structure to differentiate applicants anchor from other anchors in the art. Applicant only simply claims "a single anchor". Also, it is believed that the implant of figure 34 may be implanted alone. The implant of figure 34 is similar to shape as the implant in figures 1-6. The method of implanting the implant of figures 1-6 is disclosed to form one opening in the disc space and implanting the implant of figures 1-6 alone, and there is no disclosure of implanting a second implant, see col.6, lines 26-50, therefore, the same would apply to similarly shaped implant in figure 34. Also, figure 34 shows a complete disc implant. Whether it is implanted with an additional implant or not is a method of implantation step, and is irrelevant in a product claim. Simply, the product of figure 34 has all structural features in the claims and reads on the claims..